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ARKANSAS RIVER CONTROVERSY

DAVID W. ROBBINS

**BOUNDARIES AND WATER: ALLOCATION
AND USE OF A SHARED RESOURCE**

Natural Resources Law Center
University of Colorado
School of Law

June 5-7, 1989

I. Introduction.

A. **Summary.** The Arkansas River has long been a source of conflict between the States of Kansas and Colorado. From 1901 to 1943, there was almost continual litigation over the use of water from the river, including two original actions in the United States Supreme Court. The controversy was finally put to rest with the construction of John Martin Reservoir by the U.S. Army Corps of Engineers and the apportionment of water stored in the reservoir in the Arkansas River Compact of 1948. Recently, however, the controversy has been revived as a result of post-compact developments in both states.

II. Description of the Physical Circumstances.

A. **Drainage Basin.** The Arkansas River has its origin in central Colorado, near Leadville, and flows southeast to a point between Salida and Canon City, where it turns and flows east to Pueblo, Colorado. At Canon City, the river emerges from a narrow mountainous gorge and enters a foothills region ending near Pueblo, where it becomes a meandering stream which crosses the high plains of eastern Colorado and western Kansas. Once leaving the mountains, the river has only a limited number of tributaries which contribute little inflow except during floods.

The Arkansas River drainage basin includes more than one-quarter of the total area of the State of Colorado. Compared to other river basins in Colorado, however, the Arkansas has a very limited watershed in the Rocky Mountains. At its highest reaches, the drainage basin is barely 20 miles across. As a

result, snowmelt runoff is relatively meager compared to other major drainage basins in Colorado.

B. Geography. The largest communities within the Arkansas River basin in Colorado are the City of Colorado Springs, located on Fountain Creek at the northern edge of the basin, and the City of Pueblo, located at the confluence of Fountain Creek and the Arkansas River. Other communities in the Arkansas River basin include La Junta, Las Animas, and Lamar in Colorado, and Garden City in Kansas. The economy of communities below Pueblo is primarily based on agriculture and cattle raising.

C. Storage Facilities. John Martin Reservoir, the central feature of the Arkansas River Compact, is located on the Arkansas River approximately 58 miles east of the Colorado-Kansas stateline. The reservoir was authorized for construction by Congress in the 1936 and is operated by the U.S. Army Corps of Engineers in a manner conforming to the provisions of the Arkansas River Compact.

Other major reservoirs in the basin are Pueblo Reservoir, the terminal storage facility of the Fryingpan-Arkansas Project, a federal reclamation project, which is located on the Arkansas River just upstream from the City of Pueblo, and Trinidad Reservoir, a multi-purpose reservoir constructed on the Purgatoire River upstream from the City of Trinidad by the U.S. Army Corps of Engineers and operated for irrigation purposes by the U.S. Bureau of Reclamation. Both of these reservoirs were constructed after the Arkansas River Compact was consented to by

Congress in 1949. The operation of these reservoirs is one of the sources of contention in Kansas v. Colorado.

There is one off-channel storage reservoir in the Kansas which is filled from the Arkansas River and that is Lake McKinney, located north and east of Lakin, Kansas. Colorado has alleged that Kansas has stored water released from John Martin Reservoir in Lake McKinney contrary to the terms of the Compact.

III. Water Uses.

A. **Agricultural Uses.** Most of the water use in the Arkansas River basin is based on surface diversions from the Arkansas River and its tributaries in accordance with appropriations which date back to the mid- to late 1800's. The water supply in the basin is so limited that only water rights having relatively early priority dates are assured of an adequate water supply. A limited amount of irrigation occurs upstream from Canon City and on tributaries, but the majority of the irrigated lands in Colorado are located along the Arkansas River between Pueblo and the stateline. The irrigation ditches in Colorado below Pueblo are generally of large size. The Fort Lyon Canal, having an approximate capacity of 1,500 cfs and being approximately 95 miles in length, is the largest irrigation canal in the state. The total irrigated acreage within the Arkansas River Basin in Colorado is approximately 400,000 acres, 92,000 acres of which are irrigated under the Fort Lyon system.

At the time the Compact was signed in 1948, there were approximately 68,000 acres of land under irrigation in the State

of Kansas under ditches diverting their supply from the Arkansas River. Current estimates by the U.S. Geological Survey indicate that the amount of land presently irrigated from waters diverted from the Arkansas River or ground water which is hydraulically connected to the Arkansas River exceeds 200,000 acres in Kansas.

At least from the drought of the 1930's, wells have been used for irrigation in the Arkansas Valley. There are currently several thousand irrigation wells in Colorado and several times that number in Kansas. The majority of the wells within Colorado are used to supplement surface diversions.

In addition, the native water supply of the Arkansas River in Colorado has been supplemented for almost 100 years by diversions from other river basins, primarily the Colorado. Until the construction of the Fryingpan-Arkansas Project, the largest transmountain diversion system was operated by the Twin Lakes Reservoir and Canal Company, which diverted water from the upper reaches of the Roaring Fork River and transported it by tunnel into the Arkansas drainage for irrigation use in Crowley County. In addition, there are a number of smaller ditches which divert Colorado River water at high elevations and bring it into the Arkansas River system.

The Fryingpan-Arkansas Project is a transmountain diversion project which was authorized for construction by the U.S. Bureau of Reclamation in 1962 to import an average of approximately 69,000 acre-feet per year of Colorado River water for

supplemental irrigation, power production, and domestic and industrial uses. In addition, it was planned as part of the project that Pueblo Reservoir would be used to store waters which were historically diverted during the winter by ditches in Colorado above John Martin Reservoir.

IV. Arkansas River Compact.

A. **Compact Negotiations.** The Arkansas River Compact was negotiated by Commissioners appointed by each state, together with a representative of the United States. Their deliberations took almost three years. The result of their negotiations, the Arkansas River Compact, was signed on December 14, 1948, and later ratified by the legislatures of Colorado and Kansas and consented to by the U.S. Congress. The Compact became effective on May 31, 1949.

The Compact apportions the benefit resulting from the construction and operation of John Martin Reservoir, which was completed prior to the signing of the Compact.

B. **Basis for Apportionment.** The apportionment of the waters of the Arkansas River occurs in Article V of the Compact. The general principle of the apportionment is the division of benefits from the water stored in John Martin Reservoir on the basis of maximum rates of releases, with 60% to Colorado and 40% to Kansas. However, the Colorado releases are measured at John Martin Reservoir, while the Kansas releases are measured at the stateline, which gives Colorado the advantage of using accretions and return flows to make up Kansas' share at the stateline.

Storage in the reservoir is divided into two seasons, the first being a winter storage season from November 1 through March 31, when all inflows are stored and any releases from the reservoir are limited to no more than 100 cubic feet per second (cfs) for use in Colorado; and a summer storage season from April 1 through October 31, when all inflows are stored and releases are limited to a total of 1,250 cfs unless the Compact Administration determines that extraordinary conditions exist.

Article V of the Compact also provides that at times when there is water in storage in John Martin Reservoir, the water users within Colorado below the reservoir may not impose a call on Colorado water users diverting from the river or its tributaries upstream from the reservoir.

Further, and importantly, Article V provides that there is no allowance or accumulation of credits or debits for or against either state under the terms of the Compact. It is also important to note that at times when there is no water in storage in John Martin Reservoir, water rights in Colorado are administered as if the reservoir had not been constructed; in other words, they are administered on the basis of relative priorities throughout the river within Colorado. During this time, Kansas, under Article V, is not apportioned any water in the river, other than such water as may flow across the stateline.

C. Operation of the Compact. The provisions of the Compact are administered by the Arkansas River Compact Administration,

consisting of three representatives each from Kansas and Colorado. A representative of the United States serves as a non-voting chairman. Decisions of the Compact Administration require a unanimous vote, although in the case of a divided vote, the Administration may refer a matter for arbitration.

The Compact Administration is empowered to investigate allegations of violations of the provisions of the Compact and to make findings and recommendations; however, findings of fact made by the Administration are not binding on either state and are not a judicial determination. These provisions are similar to several other interstate water compacts negotiated in the 1940's. Enforcement of its provisions occurs through the state agencies and officials in each state charged with the administration of water rights.

D. Benefits of the Compact. The Arkansas River is a stream having tremendous variation in flow. Beginning with the Pike expedition in the early 1800's, there are reports that the river in late summer and fall was no more than a series of salty pools, while at other times, the river was a raging torrent, sweeping away whole communities in its path. The construction of John Martin Reservoir provided flood control benefits to communities downstream in Colorado and Kansas and provided space to store flows which had formerly been unusable and wasted because of the lack of a storage facility. The allocation of water stored in John Martin Reservoir resulted in a more usable water supply to downstream water users in both states. In addition, when water

is stored in John Martin Reservoir, ditches in Colorado below the reservoir are not permitted to call water from ditches upstream from John Martin Reservoir, thereby giving them a share in the benefits of water stored in John Martin Reservoir. Consistent with the decisions of the U.S. Supreme Court, which did not make any definite apportionment of water between the two states, the Compact did not provide a guaranteed delivery of any specific amount of water to Kansas. Nor did it prevent future beneficial development in either state; however, Article IV-D of the Compact provides that the waters of the Arkansas River "shall not be materially depleted in usable quantity or availability for use to the water users in Colorado and Kansas under this Compact by such further development or construction."

V. Current Controversy. Kansas v. Colorado, No. 105, Original.

A. Kansas Contentions. Kansas has alleged three basic violations of the Arkansas River Compact in Colorado.

First, Kansas alleges that post-compact well development in Colorado has materially depleted the waters of the Arkansas River in violation of Article IV-D of the Compact. Related to this contention, Kansas alleges that Colorado has failed to administer the decreed rights of water users in Colorado on the basis of relative priorities in violation of Article V-F of the Compact.

Second, Kansas contends that transfers of water in Trinidad Reservoir have materially depleted the inflow to John Martin Reservoir in violation of Article IV-D of the Compact.

Third, Kansas contends that the reregulation of native waters of the Arkansas River through the operation of a winter storage program in Colorado, without obtaining the approval of the Arkansas River Compact Administration as allegedly required by a resolution adopted by the Compact Administration in 1951, is in violation of the Compact and has materially depleted the inflow to John Martin Reservoir in violation of Article IV-D of the Compact.

B. Colorado Contentions. Colorado has filed a counterclaim alleging two violations of the Compact in Kansas.

First, Colorado alleges that Kansas has permitted unregulated well development in Kansas that has materially depleted the waters of the Arkansas River in usable quantity or availability for use to the water users in Kansas, which depletions have caused Kansas to make additional demands for releases of water stored in John Martin Reservoir to the detriment of water users in Colorado.

Second, Colorado contends that Kansas has stored water released from John Martin Reservoir in Lake McKinney in violation of the provisions of the Compact.

C. Current Status of the Controversy.

1. A motion for leave to file a complaint was filed with the U.S. Supreme Court by Kansas on December 16, 1985. The Supreme Court granted the motion for leave to file the complaint in March, 1986, and has appointed a Special Master to prepare a report. A trial is scheduled to begin on January 15, 1990.

2. In May, 1988, Colorado filed a motion to stay based on Kansas' alleged failure to exhaust its administrative remedies under the Arkansas River Compact with regard to the allegations concerning post-compact well development in Colorado and transfers of water in Trinidad Reservoir. After briefing and oral argument, the Special Master, the Hon. Arthur L. Littleworth, denied Colorado's motion to stay, in part on the grounds that there was a justiciable controversy and the return of those issues to the Compact Administration would only produce delay because the parties were obviously at loggerheads.

3. In November, 1988, Colorado filed a motion for partial summary judgment on Kansas' claim that Colorado had unilaterally rejected the 1951 Resolution adopted by the Compact Administration and a second motion to stay based Kansas' alleged failure to exhaust its administrative remedies with regard to its claim of injury from the operation of the winter storage program in Colorado. These motions are currently pending before the Special Master.

4. Recently, Kansas has filed a motion for leave to amend its complaint in two particulars.

a. First, Kansas seeks leave to add a claim that Colorado has failed to make deliveries of releases to which Kansas is entitled from John Martin Reservoir by an equivalent in stateline flow as required by Article V-E(3) of the Compact.

b. Second, Kansas seeks to amend its complaint to add a claim for damages.

VI. Summary.

A. The central issues in the current controversy between Kansas and Colorado are very similar to the issues in cases previously decided by the U.S. Supreme Court in 1907 and 1943. The issue remains: "How much water is Kansas entitled to receive, and under what conditions, from the native flows of the Arkansas River within Colorado?" In periods of drought, such as occurred in the late 1970's, there is less water for diversion in Colorado and very limited quantities of unusable flows available for storage in John Martin Reservoir. Under the Arkansas River Compact, the pre-compact water rights within Colorado are entitled to divert whatever water is available under their decrees in priority without regard to the quantity of water crossing the stateline. As the flow of the river is reduced during droughts, the water available to Kansas, as to any downstream junior appropriator, is diminished by the diversions of upstream seniors. Prior to the operation of John Martin Reservoir, Colorado water users historically dried the Arkansas River at various points. The Compact provides that when water in storage in John Martin Reservoir is exhausted, the Colorado ditches are administered on the basis of relative priorities, as though John Martin Reservoir had not been constructed. At such times, only such water as may cross the stateline is apportioned to Kansas. Thus, the impact of post-compact well development in Colorado upon Kansas is extremely complex and difficult to determine. Both states have spent hundreds of thousands of

dollars on engineering studies and models to evaluate the impacts of such development. In addition, injury to Kansas will be a central issue in the litigation since it appears that irrigated acreage in Kansas has increased substantially during the period it complains about increased depletions in Colorado.

B. There is one benefit, however, that will result from this litigation without regard to its outcome. A tremendous body of technical information is being developed on water use in Colorado and Kansas. Compilation and analysis of this technical data will be available to water users within the Arkansas River Basin and state officials and will provide a better understanding of the way in which the river system operated historically and, hopefully, will permit better decisions on future water use and allocation, particularly if municipalities in Colorado continue to purchase agricultural water rights in the Arkansas River to provide water supplies for future growth.

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